IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.696 OF 2003

IN

L.C. SUIT NO.1296 OF 1998

Shri Pratap Vallabhji Kavi,
residing at 4th floor,
Mahakali Mansion,142,
Perin Nariman Street,
Fort, Mumbai-400 001. .. **Appellant**
(Org.Plaintiff)

Versus

1. **The Bombay Municipal Corporation**
a statutory body established under
Bombay Municipal Corporation Act,
having its office at Mahapalika
Bhavan, Mahapalika Marg, Fort,
Mumbai-400 001.

2. **Dy. Municipal Commissioner (Zone-I),**
"E" Ward, Municipal Office Building,
10, S.K. Hafizuddin Marg, Byculla,
Mumbai-400008.

3. **Chandulal A. Khokhara,**
residing at Mahakali Mansion,
3rd floor, 142, Perin Nariman Street,
Fort, Mumbai 400001. .. **Respondents**
(Org.defendants)

Shri Anil A. Desai, Advocate for Appellant

Mr.J.J. Xavier,Advocate for BMC i.e. Respondent Nos.1 and 2.

Shri Shailesh Thakkar i/b. M/s. Shailesh Thakkar and Co. for Respondent No.3.

CORAM : ***S.R.SATHE,J.***

DATED : ***21st June, 2006***

ORAL JUDGEMENT :-

1. Appellant, the original Plaintiff in L.C. Suit No. 1296 of 1998 has preferred this appeal against the judgment and order passed by the Judge, City Civil Court, Greater Bombay whereby the Plaintiff's suit for declaration and injunction filed against the Bombay Municipal Corporation was dismissed with costs. For the sake of convenience hereinafter parties shall be referred to as Plaintiff and Defendants.

2. Plaintiff's case in brief is that he is in occupation of the suit premises i.e. one room situated on the 4th floor of Mukta Nivas (presently known as Shree Mahakali Mansion) situated at 142, Perin Nariman Street, Fort, Mumbai for more than 40 years. Prior to 1960, Plaintiff's sister Sarasvati Vallabhji Kavi was tenant in the said room and was paying monthly rent of Rs. 50/- to Muktagauri Vallabhji Kavi and Vallabhji Sunderji Kavi Trust. The owner of the said building, Sarasvati Kavi died on 21st May, 1996.

3. The defendant No.3 purchased the suit building in April-1978. At that time, a list of tenants was

annexed to the agreement to sale in which tenancy of Saraswti Kavi was recognised. Not only that but the defendant No.3 also accepted rent from her and issued rent receipts.

4. In the year 1981, the defendant No.1 Corporation issued notice dated 13/02/1981 under section 351 of the Bombay Municipal Corporation Act (hereinafter referred to as BMC Act) to Sarasvati alleging that the construction of bathroom, kitchen platform in the passage on the 4th floor of the building is unauthorised. In pursuance of the reply given by her, Dy. Municipal Commissioner (Improvement) visited the site on 07/04/1981. However, as he was satisfied about the construction, no further action was taken. Few years thereafter major repairs were carried out in the said building through Maharashtra Housing Board. For that purpose, tenants in the building had submitted necessary plans and the same were approved. The Plaintiff had paid an amount of Rs. 5,000/- as his contribution towards the expenses of the said repairs.

5. On 11/10/1996, the defendant No.1 Corporation issued another notice u/s. 351 of the BMC Act to Plaintiff and alleged that the whole construction of 4th

floor with brick masonry walls and Manglore tiled roof is illegal and unauthorised. The defendant Corporation therefore called upon the Plaintiff to produce necessary documents and evidence before defendant No.2 to show that the construction in question is legal. The Plaintiff therefore filed L.C. Suit No. 1 of 1997 in the Bombay City Civil Court and challenged the notice. The City Civil Court by its order dated 10/10/1997 referred back the matter to Corporation and directed to give an opportunity to the Plaintiff and take the decision after giving due hearing. Accordingly, the Plaintiff submitted the necessary documents, however, the defendant issued order dated 21/01/1998 calling upon the Plaintiff to remove the construction of 4th floor.

6. It is Plaintiff's case that the defendant No.3 landlord of the suit premises wanted to evict the Plaintiff and as such he had filed eviction suit against Sarasvati Kavi, the Plaintiff and his wife Padmavati in the Court of Small Causes at Bombay. However, realising that he would not get the possession in the said suit, the defendant No.3 chose to adopt shortcut method of instigating the defendant No.1 for taking action for demolition of the suit premises.

Thus, according to Plaintiff, the suit notice is not bonafide and it has been issued in collusion with defendant No.3. Plaintiff, therefore, filed the present suit and prayed for declaration that the notice dated 11/10/1996 and the subsequent order/letter dated 21/12/1996 calling upon the Plaintiff to demolish the suit structure are not bonafide, legal and valid and against the provisions of law and rule of justice and not binding on the Plaintiff. The Plaintiff also prayed for permanent injunction restraining the defendants from implementing the notice dated 11/10/1996 and subsequent order/letter No. WOA/31867 dated 21/12/1996.

7. The defendant Nos. 1 and 2 filed their joint Written Statement and opposed the suit claim. They contended that the defendant No.3 who is the landlord of the suit building is supporting the action of defendant Nos.1 and 2 and he has also stated that the 4th floor of the said building was not in existence at all and the building was only of ground plus 3 floors and the construction of 4th floor was carried out after 1970 by the Plaintiff. According to the defendant Nos. 1 and 2, documents produced by the Plaintiff before them were not sufficient to show that the 4th floor structure was in existence prior to 1970. The Plaintiff

also failed to show that the structure in question was in existence prior to datum line i.e. prior to 17/04/1964. As against this, the documents produced by defendant No.3 and in particular the Cadestral Survey Sheet No. 60 (5th Edition 1961) showed that the suit building was consisting of ground plus 3 upper floors. Even the Electoral List for the year 1967 to 1972 showed that the building is having only ground plus three upper floor and Sarasvati Kavi was residing on 3rd floor. The defendant Nos. 1 and 2 therefore contended that the notice issued by the Corporation to Plaintiff is legal and valid and it was not issued with collusion with defendant No.3.

8. The defendant also contended that the suit is bad as the Plaintiff has not issued notice under section 527 of the BMC Act and suit is liable to be dismissed on that ground alone.

9. The defendant No.3 filed his Written Statement and contended that prior to 1978 Vallabhji Sunderji Kavi was the owner of the suit building and 4th floor was illegally and unauthorisedly constructed by the then owner in the 1971-72 in total violation of BMC Act and Rules under the guise of repairs. Tenants of the

suit building had accordingly issued letter dated 14/06/1971 to defendant No.1. He admitted that he purchased the suit building in the year 1978 from Sarasvati Kavi, sister of Plaintiff and Muktagauri Vallabhaji Kavi, Executor of the will of the owner of the suit building. According to him, prior to 1971 Plaintiff and his parents used to reside on the 3rd floor of the suit building. In the Electoral Role of the year 1967-1972 Plaintiff was shown as occupant of 3rd floor. While in Electoral Role of the year 1979 to 1985 he was shown as occupant of the 4th floor. Thus, according to defendant No.3 the suit structure was not in existence prior to 1971. He also contended that the Cadestral Survey Sheet No. 60 also establishes his contention and the notice issued by the defendant Corporation is legal and correct.

10. Defendant No.3 also denied the allegation that Sarasvati Kavi was the tenant in the suit premises prior to 1960. He further contended that rent receipts produced by the Plaintiff for the year 1960 onwards are signed by the Plaintiff and the same are fabricated and prepared by Plaintiff to support his case. The defendant No.3 also contended that the other documents produced by the Plaintiff before the Corporation were

not sufficient to show that the suit structure was in existence prior to 1971. According to him the previous landlord i.e. relative of Plaintiff has illegally and unauthorisedly constructed the 4th floor and thus the action proposed by the Corporation is legal and correct. He therefore contended that Plaintiff's suit be dismissed.

11. On these pleadings, the Learned Trial Judge framed as many as eight issues. In order to prove his case, the Plaintiff examined himself and 4 other witnesses. As against this, on behalf of the defendant Nos. 1 and 2, they examined Rajbhav Narendra Kumar Ramlochan. The defendant No.3 examined himself.

12. After considering the oral and documentary evidence adduced by both the parties, the Learned Trial Judge came to the conclusion that the Plaintiff has failed to prove that the suit premises was in existence prior to datum line of 17-4-1964 and the documents produced by the Plaintiff do not support his case. The Learned Trial Judge also held that the defendant Nos. 1 and 2 had proved that the Plaintiff has failed to issue statutory notice under section 527 of the BMC Act. According to Learned Trial Judge, the Plaintiff also

failed to show that the notice issued by the BMC regarding demolition was illegal. Naturally, the Ld. Trial Judge dismissed the Plaintiff's suit with costs.

13. Being aggrieved by the above mentioned judgment and order, the Plaintiff has filed the present appeal. In this appeal before me Shri Anil Desai,learned Advocate for the Plaintiff has urged only three points. Firstly, he submitted that Learned Trial Judge has not properly appreciated the evidence on record and has failed to note the important admission given by the witness of defendant Nos. 1 and 2. According to him, the documents produced by the Plaintiff and in particular the will dated 10/12/1965 ought to have been relied upon by the Learned Trial Judge. Secondly, he canvassed before me that the Learned Trial Judge ought to have considered the fact that the Plaintiff is not the owner and as such was not bound to produce the original plan or sanction order regarding construction or permission and due weightage should have been given to the fact that the corporation did not produce the initial map when the suit building was constructed. Lastly, he submitted that defendant No.3 was interested to evict the Plaintiff and as such he was bound to support the corporation action. In fact, realising that

he would not get possession decree in suit filed in Small Causes Court, the defendant No.3 managed to issue suit notice to Plaintiff. He therefore submitted that the appeal be allowed. The judgment and order passed by the Learned Trial Judge be set aside and Plaintiff's suit be decreed in his favour.

14. As against this, the Learned Advocate for the defendant Nos.1 to 3 supported the judgment and order passed by the Learned Trial Judge.

15. It was vehemently argued by the learned Advocates for the defendants that the plaintiff has not produced any documentary evidence either in the form of the order or plan to show that permission for construction of 4th floor was granted by the defendant -Municipal Corporation. They therefore, submitted that the learned trial Court rightly held that the suit premises i.e. 4th floor of the suit building was not in existence prior to 1964 and dismissed the suit. They, therefore, prayed for dismissal of the appeal.

16 It is not in dispute that the suit building is about 90 years old. The evidence of PW 1 Pratap Vallabhaji Kavi in this behalf has gone totally

unchallenged. It is also an admitted fact that in th year 1978 the present defendant no.3 purchased the suit property and prior to that agreement was also entered into. From the defendants' own evidence and suggestions put to PWS, it appears that even according to the defendants the construction in question i.e. 4th floor was made in the year 1971 or thereabout. It must be noted that defendants stand in this behalf is in fact not consistent. At one stage it is suggested to PW that the said floor is constructed in the year 1975 and at one stage even it is suggested that the same came in existence since 1971. It is also an admitted fact that the plaintiff has not produced any original map or order showing that 4th floor was constructed with permission of the Corporation. However, it is the case of the plaintiff that when notice for demolition under Section 351 of B.M.C. Act was issued. He was not the owner of the suit property and as such naturally he was not expected to produce the said map. According to him the defendant Corporation should have at least produced the original map on the basis of which permission was granted for construction of the building. However, we find that the Corporation has also not produced the said map and Corporation is even not in a position to make any positive statement as to whether the entire

building itself was constructed without obtaining permission from the Corporation. However, having regard to the fact that in the year 1996 they issued notice under Section 351 wherein they have alleged that the construction of 4th floor is unauthorised one can presume that according to them the rest of the construction is authorised and legal. It is the positive case of the plaintiff that the construction in question i.e. 4th floor was in existence at least since 1953 or thereabout when Sarasvatibai and thereafter plaintiff started residing therein.

17. Fate of this appeal depends on the question as to whether construction of 4th floor in respect of which notice dated 14-10-1996 was issued by the defendant Corporation to plaintiff was in existence prior to datum line i.e. prior to 17-4-1964. It is not in dispute that if the plaintiff is in a position to show that the construction in question was in existence prior to 17-4-1964 then the said construction cannot be demolished by the Corporation. So, let us scan the evidence on record to find out whether the construction in question was in existence prior to 17-4-1964.

18. In the absence of any specific order issued by

the Corporation or any map we have to take into consideration all other necessary documentary and oral evidence as well as the circumstances to find out whether the plaintiff's version is true, correct or probable or whether the contention of the defendant is true and correct. It is an admitted fact that there are several tenants in the suit building which was previously known as Mukta Niwas. After the time the defendant no.3 purchased it in the year 1978 he changed the name of the building and since then it is known as Mahakali Mansion. Plaintiff has produced at Exh.10 the letter sent by the tenants of Mukta Niwas to the defendant Municipal Corporation on 14-6-1971. In that letter the tenants have mentioned:

> *"We might mention here that an additional floor (4th floor) was constructed without heeding to our request of doing the necessary repairs to already dilapidated building".*

Considering the fact that this is a very old letter and that too written by tenants, one can safely say that 4th floor was certainly constructed prior to 14-6-1971. It is pertinent to note that the words used in the said letter are "was constructed". Naturally, now we only have to see whether the construction in question i.e. of 4th floor was made prior to datum line

of 17-4-1964.

19. It must be noted that PW 1 Pratap Vallabhaji Kavi who is the son of original landlord of the said building has stated in his evidence that the said building is of 93 years old. He has also stated that since beginning he was residing in the said building and that they were residing on 3rd and 4th floors. On the date of evidence this witness was of 78 years of age. He has categorically stated that construction of 4th floor was in existence much prior to 1964 and his sister Sarasvati was residing on the said floor as a tenant. The fact that Sarasvati was residing there as a tenant cannot in fact be disputed, though feeble attempt has been made by the defendant no. 3 i.e. Present landlord who has purchased the property in the year 1978 that Sarasvati was a tenant. One cannot accept his evidence in that behalf particularly when we find that admittedly even in the agreement which was entered into between the landlord and defendant no.3 about the purchase of the suit building, a list of tenants was given and in that list the name of Sarasvati is shown s a tenant occupying 4th floor. So, now in fact it does not lie in the mouth of the defendant no.3 that Sarasvati was not a tenant. It is

pertinent to note that PW 1 Pratap Kavi has stated that after his marriage he started residing on 4th floor. It must be noted that evidence in this behalf is not at all challenged by the defendant Municipal Corporation. Naturally, due weightage shall have to be given to this statement of Pratap Kavi as well as the evidence of his wife.

20. It is pertinent to note that plaintiff has produced certified true copy of the alleged Will executed by his father on 10-12-1965 from the period of the same it is clear that it is registered at Sr.No.148/1965 on 10-12-1965. It is true that no probate was obtained of the said Will. However, merely that by itself is not sufficient to discard the said will particularly when the same is to be used only for collateral purpose i.e. In order to show whether 4th floor was in existence at that time. If we see the said will which is registered one then we find that it is clearly mentioned therein by Vallabhaji that at present they are residing on 3rd floor and 4th floor of the said building. It is needless to say that at that juncture there was no dispute about the 4th floor, nobody had issued any objection for 4th floor, the Corporation had also not issued any notice. So, under

such circumstances there was no reason for Vallabhaji to make a false averment in the Will dated 10-12-1965 that he was residing on 3rd and 4th floors of the suit building. By no stretch of imagination it can be said that Vallabhaji made a reference accordingly with a view to create evidence in that behalf. In my opinion, this is a very important piece of evidence which certainly supports the case of the plaintiff. It is true that will is dated 10-12-1965 and we are considering as to whether construction in question is prior to 17-4-1964. So, there is a difference of about 1 ½ years but considering all other facts and circumstances it has to be held that the said construction of 4th floor must have been carried out prior to 17-4-1964.

21. There is another piece of evidence. The plaintiff has produced at Exh.U, original book issued by the Gas company. It is also dated 10-12-1965. In that document also residence of Vallabhaji Kavi is shown as 4th floor, 142 Bazaar Gate Street. The plaintiff's statement in this behalf is not challenged in the cross examination. If it is to be presumed that this book is a false or fabricated one, then plaintiff would have straightway managed to mention the date

prior to datum line i.e. 17-4-1964 but that has not happened. So, the plaintiff's evidence in this behalf cannot be discarded.

22. The plaintiff has also produced the certified copy of the voters list for the year 1967 to 1972. In that list it is shown that plaintiff was residing on 3rd floor. At the same time the voters list for the year 1972 to 1977 clearly shows that the plaintiff is residing on the 4th floor, but it must be noted that merely from this one cannot jump to the conclusion that 4th floor was constructed after 1972. It must be noted that admittedly, plaintiff has categorically stated that initially they were residing on 3rd and 4th floor. Naturally, while entering their names in the voters list in the year 1972 it is not necessary to mention that they are residing on 3rd and 4th floors. It was sufficient to mention only 3rd floor. In the latter voters list for the year 1972-1977 it is shown that plaintiff is residing only on 4th floor and on 3rd floor some other person is residing. So, it cannot be said that Exh.11 voters list totally negatives the case of the plaintiff.

23. It appears that the trial Court as well as the

defendant Corporation has mainly placed reliance on Exh.9 to hold that 4th floor was not in existence prior to 17-4-1964. Exh.9 is the Cadestral Survey sheet no.60, 5th edition, 1961. In that sheet the suit building is shown and there is mention of figure “IV”. The witness for the Corporation has stated that this IV indicates that building is ground plus 3 floors. Of course, on what basis he has mentioned so, one does not know because he has not pointed out any rule wherein it is mentioned that while showing the floors of the building it should be mentioned accordingly. On the contrary, if that test is to be applied then we find that in this very sheet for the said building there is mention of figure “V”. It is true that the said figure is shown in the left hand corner portion, but still then if the first interpretation which is given by the Corporation's witness is to be accepted then one can also safely say that some portion of the said building was consisting of ground plus four floors and that is why figure “V” was shown for part of the said property. This was also obviously in the year 1961, so under such circumstances we have to hold that plaintiff's evidence is acceptable when it is not specifically controverted in the cross examination and on the contrary it is supported by some documentary evidence which would go

to show that at least some portion of the said building was consisting ground plus 4 floors. At this stage it must be mentioned that notice for demolition issued on 11-10-1996 is also vague. If really it was the case of the Corporation that some portion of 4th floor was already constructed and particular portion was subsequently constructed they should have mentioned the same specifically but that has not happened. So, this Cadestral Survey Sheet of the year 1961 is certainly not sufficient to hold that there was no construction on 4th floor or that the suit structure was not in existence prior to 17-4-1964.

24. In order to support their contention the Corporation examined one witness by name Hiralal Shah, DW1, admittedly, he is also residing in the said building since his childhood. The said witness was aged about 70 years when he deposed. Though he tried to support the Corporation by saying that the plaintiff carried out the construction subsequently it must be noted that his evidence does not help the corporation particularly when we find that the said witness has clearly stated in his cross examination

> "I cannot say exactly whether there was no 4th floor in existence till the year 1971."

So, this evidence also in a way lends support to the plaintiff's version.

25. There is another aspect of the matter. Firstly, it must be noted that building in question is quite old one. According to the tenants the then landlord carried out the construction of 4th floor prior to 1971. If really the construction would have been carried out illegally and unauthorisedly then normally the Corporation would have taken immediate action finding that new floor has been constructed particularly when we found that as per provisions of Corporation after expiry of certain period Corporation undertakes to inspect the property for assessment. Admittedly, at no point of time the Corporation made any grievance that some new portion has been constructed. On the contrary we find that in the year 1980 or thereabout some tenants had made a grievance about the construction and at that time notice was also issued to the then landlord and then landlord had informed that construction is in existence since long back and no new construction has been carried out. Thereafter, admittedly, one Mr.Kamdar, Deputy Municipal Commissioner visited the suit site and admittedly thereafter no action was taken against the landlord in

respect of the alleged unauthorised construction. The learned Advocate for the Corporation was in fact asked to give explanation about this and to produce any material if any, they are having in this behalf with a view to decide the matter justly and correctly but the Corporation was unable to produce any document in this behalf or to give any satisfactory explanation. All that they said that they are not having any material with regard to the same. Under the circumstances, it must be presumed that the Deputy Municipal Commissioner must have been satisfied about the existence of 4th floor prior to 17-4-1964 and as a result of the same he must not have taken any action against the then landlord in respect of the alleged unauthorised construction. So, this circumstance, if taken into consideration in the light of other evidence it lends support to the plaintiff's case.

26. It is the case of the plaintiff that the defendant no.3 had in fact filed a suit against him for eviction in the Small Causes Court, Mumbai. After releasing that he is not likely to get possession in the said matter he instigated the Corporation to issue notice under Section 351 of B.M.C. Act by making false complaint. It is worth to note that though in a

document which was executed at the time when defendant no.3 purchased the property Sarasvati was shown as a tenant on 4th floor, the defendant no.3 even tried to submit that she is not a tenant in the said property. So, it does appear that the defendant no.3 is interested in evicting Sarasvati or plaintiff, otherwise, no landlord himself would go to Corporation and say that particular portion of the building owned by him is unauthroised and that too particularly when same was already in existence on the date when he purchased the property.

27. It is an admitted fact that initially plaintiff had filed suit No.1/1997 to challenge the notice dated 11-10-1996 issued by the defendant-Corporation and in that matter after hearing both the parties the then learned trial Judge found that the proper opportunity was in fact not given to the plaintiff to put forward his case. He observed that it is necessary to give sufficient opportunity to plaintiff to put forward his case and as such the suit was disposed of. It does appear that thereafter the plaintiff produced certain documents before the Corporation. However it is his grievance that he was not given personal hearing though he had asked for the same. It is pertinent to note

that if we see the order passed by the Corporation on 21-1-1998 it certainly gives the impression that the concerned officer heard the learned Advocate for defendant no.3 with regard to the allegations regarding unauthorised construction. However, admittedly no personal hearing was given to the defendant no. 3. Of course, it was argued before the lower Court that even the learned Advocate for the defendant no.3 was also not given any opportunity to make his submissions but only because the documents were produced along with his letter the Deputy Municipal Commissioner observed :

> “Advocate Shailesh Thakkar contended that Cadestral Sheet shows only ground plus 3 upper floors”.

From these observations it does appear that Advocate for the defendant no.3 must have been given personal hearing while plaintiff was admittedly not given such hearing. So, one may say that it caused prejudice to the plaintiff.

28. It is tried to be argued on behalf of the defendants 1 and 2 that suit is bad for want of notice under Section 527 of the B.M.C. Act. However, plaintiff has produced at Exh.Q notice dated 6-2-1998. It is received by defendants 1 and 2. It gives all necessary

details as contemplated by Section 527 of the B.M.C. Act. So there is no substance in the contention taken by defendants 1 and 2 in this behalf.

29. In view of the above discussion it has to be held that the evidence on record, conduct of the parties and the prepondrence of probabilities certainly support and establish the plaintiff's version that the construction in question was in existence prior to datum line of 17-4-1964. When such is the position, the structure in question cannot be demolished on the basis of notice dated 11-10-1996 issued under Section 351 of the B.M.C. Act. It is therefore, necessary to set aside the order passed by the trial Court.

O R D E R

The Appeal is allowed. The order passed by the Judge, City Civil Court, Greater Bombay in L.C. Suit No. 1296 of 1998 on 29/03/2003 is set aside.

It is hereby declared that the notice bearing No.41937 dated 11/10/1996 and speaking order bearing No.MDBA/AN/355 dated 21/11/1998 passed by the Dy. Municipal Commissioner, Zone-I is not legal and correct.

The defendants are restrained from taking any action of demolition of the suit premises (room on the 4th floor of Shri Mahakali Mansion, Fort, Mumbai) on the basis

of above mentioned notice dated 11/10/1996 and speaking order dated 21/11/1998.

Considering the peculiar facts of the case parties to bear their own costs of this appeal.

(S.R.SATHE,J)